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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 344

ARTHUR L. BELL ET AL.,

Petitioners,

vs.

R. B. HOOD ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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I. Petitioners' Reply to Respondents' Statement

1. The respondents' statement is posited largely, not on the allegations contained in the petitioners' complaint which, the trial court ruled, failed to disclose jurisdiction (R. 151, but on affidavits and counter-affidavits submitted to the trial court in connection with a motion for summary judgment made by the respondents (R. 42). These affidavits, and the portions of the respondents' statement relying upon the affidavits, should be ignored by this Court for the following reasons:

(a) Neither the District Court (R. 151) nor the Circuit Court below (R. II, 168) based their ruling upon the affi-

davits, nor even considered them. Their decisions were arrived at solely upon a consideration of the recitals contained in the complaint, which complaint the courts below, respectively, ruled, did not state a cause of action conferring jurisdiction upon the trial court. No reference is made by either court below to the affidavits as the basis for their decisions. Cf. Opinion of District Court (R. 145); Opinion of Circuit Court (R. 168).

(b) The evidence submitted by the respondents, in support of their motion for summary judgment, constituted *defensive* material, which under the respondents' own theory, may not be considered in determining the jurisdiction of the District Court (Cf. Brief for Respondent, p. 24).

Accordingly, this Court should ignore all portions of the respondents' statement relying upon factual material appearing in the Record, other than those set forth in the petitioners' complaint.[1] Accordingly, if this Court limits itself to an appraisal of the import of the recitals in the petitioners' complaint, it will readily find itself in accord with the observation of the Circuit Court below that: "There can be no question but that the complaint states strong cases, and if the allegations have any foundation in truth, the plaintiffs' legal rights have been ruthlessly violated" (R. 173). (Italics ours.)

2. The references in the respondents' "statement" to the ruling of the trial court in the case of *Bell* v. *United States*, now pending on appeal in the Ninth Circuit Court of Appeals (*Bell* v. *United States*, 9 C. C. A., No. 10432), on

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[1]The petitioners' complaint appears in the Record at pp. 2-30; all page references in the Respondents' Brief to the Record from pp. 34-134 are references to affidavits and counter-affidavits; these should not be considered by this Court.

the occasion of the trial of the petitioners on criminal charges, are similarly out of place in the instant proceedings. The trial court below rejected the respondents' contention that the ruling of the trial judge in the criminal case was *res judicata* in the instant case (R. 157). From this ruling the respondents have neither taken, nor prosecuted, any appeal.

The reason for the respondents' thus venturing into fields *de hors* the Record in this case is not clear.

Nor does the relevancy of the respondents' reference to the petitioners' conviction upon charges of conspiracy to commit "sedition" appear, for this Court has ruled often enough that the constitutional guarantee against unreasonable searches and seizures protect the guilty as well as the innocent:

> "The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. * * * Its protection extends to offenders as to the law abiding." U. S. v. Lefkovitz, 285 U. S. 452, 464.

II. Reply to Respondents' Argument

1. The right of the petitioners to sue is not derived from local or common law, exclusively, as suggested by the respondents. By virtue of the express guarantees of the Fourth Amendment, the right to be free from unreasonable searches and seizures, formerly a general right arising out of general or common law, became a specific federal constitutional right expressly protected by the federal Constitution. It is for the vindication of that expressly vouchsafed federal constitutional right, that the petitioners filed their complaint in the federal District Court below. That the common law buttresses their rights, does not undermine its federal constitutional support and express federal sanction.

The respondents misread Title 28, U. S. Code, Sec. 41(1) when they, in effect, substitute the word "create" for the word "arise." The word "create" is also substituted for the provision of the statute which contains the phrase "arises" in unfortunate dicta in *Gully* v. *First National Bank*, 299 U. S. 109, 112, and *Puerto Rico* v. *Russel & Co.*, 288 U. S. 476, 483 (quoted in Respondents' Brief, p. 16).

Moreover, California common law does not expressly guarantee the citizen freedom from unreasonable searches and seizures; and no claim has been made by the respondents, nor can the claim be made, that California law protects the citizen of the United States from unreasonable searches and seizures, as "broadly" as does the Fourth Amendment, and the liberal construction of that Amendment given by the federal courts. Thus Sec. 3274 of the California Civil Code provides merely:

> "Species of Relief. As a general rule, compensation is a relief or remedy provided by the law of this state for the violation of private rights, and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in this part of the Civil Code."

This is just a general rule pertaining to the right to relief generally; it is to be noted that that section of the California Code (cited in Respondents' Brief at p. 17) expressly limits relief in the California courts to those specified in the California Civil Code.

Also, even if the common or state law of California were adequate, this is no argument against the existence of concurrent jurisdiction in the District Courts of the United States under 28 U. S. Code, Sec. 41(1). Thus, even if the acts of the defendants may be termed "torts" or "trespasses," as distinguished from direct violations of the constitutionally protected right against unreasonable searches and seizures, there is jurisdiction in the Federal District

Courts because they have authority to enjoin a threatened trespass by federal officers. This seems to be the import of the ruling of this Court in an opinion by Justice Black just handed down in *Mine Safety Appliances Company* v. *Forrestal*, decided December 10, 1945, and reported in 90 Law. ed. (Adv. Op.) 165, 167. In that case, *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, is followed, and the Court, in passing, suggested that there would be jurisdiction in a United States District Court where a complaint sought a court injunction against "a threatened *trespass* against any property in the possession of or belonging to the appellant." (Italics ours.)

Furthermore, the Solicitor General's statement in reply to a question from the Chief Justice, in the course of the oral argument, which statement was to the effect that constitutional provisions do not give rise to a cause of action in the federal courts, unless Congress has implemented a constitutional provision with express statutory authority for the filing of a suit in the federal courts, is answered by the provisions of Title 28, U. S. Code, Sec. 41(1), which provides that a cause of action may arise from the "Constitution *or* laws of the United States," and not, as would be the effect of the claim of the Solicitor from the "Constitution *and* laws of the United States."

2. Moreover, there is no express federal statute conferring jurisdiction in the federal District Courts to enjoin federal officers from threatened illegal or unconstitutional conduct; yet the respondents concede such jurisdiction (Respondents' Brief, p. 30). (*Ickes* v. *Fox*, 300 U. S. 82, 95, would, in any event, seem to be conclusive upon the jurisdiction of the federal courts to grant such injunctions.) See also *Texas and New Orleans Railroad* v. *Brotherhood*, 281 U. S. 548, 569, to the effect that where a statutory right is created, the federal District Courts have jurisdiction, by appropriate process, to enforce that right,

although Congress has not expressly conferred such jurisdiction. It would seem to follow that where a right is guaranteed or protected by an express provision of the Federal Constitution, the courts of the United States are not powerless to enforce such right because Congress has not taken the trouble expressly to instruct the federal courts to accord such protection.

It would seem that for an illegal search and seizure the following federal proceedings may be instituted:

(1) The aggrieved person may file a claim with the Attorney General if the federal officers, as in the case at bar, are special agents of the FBI, but only for a sum not to exceed $500. 31 U. S. Code, Sec. 224.

(2) The federal officer may be prosecuted for a criminal charge. 18 U. S. Code, Sec. 53(a) and Sec. 631.

(3) If the illegal search has not yet taken place but is threatened, the federal officer may be enjoined. See *Ickes* v. *Fox*, *supra*.

(4) A petition may be filed in the federal court to recover the property illegally seized. *U. S.* v. *Lefkowitz*, 285 U. S. 452.

(There is no special congressional statutory enactment authorizing the last two proceedings.)

(5) A suit for damages in a United States District Court. Where the citizen claims damages in excess of $500, and hence the filing of a claim with the Attorney General would be inadequate, there should be no reason why, under the broad provisions of Sec. 41 (1) of 28 U. S. Code, he may not sue for damages in the United States District Court; just as he might apply for the return of documents illegally seized or apply for an injunction before the search has been made.

3. Insofar as the complaint recites a violation of the rights of the petitioners under the Fourth Amendment, the complaint does not contain "an anticipatory replication to a probable defense" (Respondents' Brief, p. 24).

If, as the respondents claim, the trial courts' order dismissing the complaint was under 28 U. S. Code, Sec. 80 (Respondents' Brief, p. 2) and that it was proper for the trial court, as well as it is for this Court, to consider the defensive material proffered by the defendants in support of their motion to dismiss and for summary judgment appearing in the Record at pp. 34-134), then, at the time of the trial courts' order of dismissal, there was in direct issue the scope of Title 5, U. S. Code, 300(a). Hence the scope and meaning of that federal statute was directly in the case, then *not* by way of *anticipatory defense* on the part of the petitioners, but by way of *asserted defense* by the defendants themselves.

There was then before the District Court a real and substantial "dispute or controversy properly within the jurisdiction of said District Court" and within the meaning of 28 U. S. Code, Sec. 80.

4. To support their argument that "the decision below is in accord with the rulings in other circuits" (Respondents' Brief, p. 26), they cite two cases that are in point.

The first, *Viles v. Symes*, 129 F. (2d) 828, C. C. A. 10, certiorari denied, 317 U. S. 711, was an action filed and prosecuted, both in the courts below, and in this Court *in pro per*. A decision in a case in which the party litigant functions without the aid of skillful counsel, is hardly one that should be persuasive upon the important question of judicial policy in the instant case.

Taylor v. *De Hart*, 22 F. (2d) 206, was a decision by a District Court.

It is offset by the better-reasoned District Court opinion in *Rury* v. *Gandy*, 12 F. (2d) 620.

Respectfully submitted,

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